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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-419

PITTSBURGH PRESS COMPANY,

Petitioner,

v.

THE PITTSBURGH COMMISSION ON HUMAN RELATIONS AND THE CITY OF PITTSBURGH,

AND

THE NATIONAL ORGANIZATION FOR WOMEN, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

BRIEF FOR AMICUS CURIAE WOMEN'S LAW FUND, INC.

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INTEREST OF AMICUS CURIAE

en's Law Fund, Inc. is a non-profit corporation
e sole purpose of "bring[ing] women into full
tion in all activities of American life by securing

them their full legal rights under the Constitution." The Fund is particularly concerned with the problem of achieving equal employment opportunity for women, and, through its funding of litigation, Women's Law Fund, Inc. seeks to assist all women who are discriminated against solely because of their sex through illegal employment practices.

Millions of American working women are presently being denied equal access to the job market. Despite high economic motivation to work, women continue to be barred from non-traditional, often higher paying work roles. Newspapers which provide sex segregated ad columns, and employers who, in violation of federal law, prefer employees of a particular sex, persist in discriminatory practices.

The help-wanted column format utilized by the Pittsburgh Press and newspapers across the country provides vast commercial profit to publishing companies while serving as a shield of protection to hide the many employers who continue to discriminate.

It is timely for the Court, in the instant case, to pierce this shield of discrimination. In view of the pending resolution of the significant issues here raised and their precedent setting impact on the 31.5 million women now in the work force, the Fund wishes to present this *Amicus Curiae* brief to the Court.

INTRODUCTION

The Pittsburgh Press has been accused of violating Section 8(j) of the Pittsburgh Human Relations Ordinance (sometimes hereinafter referred to as the Pittsburgh Ordinance or the ordinance) because of its discriminatory help-wanted advertising policy.

The Pittsburgh Commission on Human Relations, the Court of Common Pleas of Allegheny County, and the Commonwealth Court of Pennsylvania,[1] have all held that the newspaper, by publishing help-wanted notices in sex-segregated columns, did violate the ordinance.

The Pittsburgh Press claims that the advertising policy of the newspaper is editorial in nature, protected by freedom of the press as guaranteed by the First Amendment to the United States Constitution. This protection, according to the newspaper, prevents the Pittsburgh Ordinance from regulating its advertising help-wanted column headings. The Press further alleges a due process violation claiming that the ordinance does not apply to any act of a newspaper until an independent act of discrimination has been proven against one of its advertisers.

Amicus, Women's Law Fund, Inc., submits that the newspaper's help-wanted advertising policy is a commercial aspect of the newspaper, subject like other activities to governmental regulation and control. The testimony is replete with evidence of the discriminatory effect of the newspaper's advertising policy. An inspection of the Pittsburgh Ordinance, in particular, Sections 3, 8 and 11, substantiates the view that a newspaper enjoys no special exemption from the purview of the ordinance with respect to its classified advertising pages.

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[1]The opinion of the Pittsburgh Commission on Human Relations is found in the Appendix to the Petition for Writ of Certiorari at page 1a; the Opinion of the Court of Common Pleas of Allegheny County is found in the Appendix to the Petition for Writ of Certiorari at page 19a; the Opinion of the Commonwealth Court of Pennsylvania is reported at 4 Pa. Cmwlth. 448, 287 A.2d 161, *allocatur denied,* June 21, 1972 (Pa. Sup. Ct. 1972).

ARGUMENT

I.

PROVISIONS OF THE PITTSBURGH ORDINANCE DO NOT IMPAIR THE FREEDOM OF THE PRESS.

A. Newspaper Advertising Is a Commercial Activity Subject to Governmental Regulation.

The First Amendment accords great freedom to the press and protection of this freedom is essential to the maintenance of our democratic society. However, the extent of protection to be accorded the press has a direct relation to whether its activity is editorial or commercial in nature. One issue presented to this Court for determination is whether under the First Amendment to the United States Constitution the decision to adopt separate classified advertising headings based on sex, being commercial in nature, is subject to control, or whether such a decision is a protected editorial activity.

Newspaper advertising, *per se*, is neither a commercial nor an editorial activity. Advertisements which communicate grievances, protest abuses or seek to enlist financial aid for a cause have been held to be protected expressions of First Amendment freedoms,[2] while restrictions on commercial speech are compatible with First Amendment guarantees.[3]

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[2] *See New York Times Co. v. Sullivan*, 376 U.S. 254, 265-266 (1964); *Smith v. California*, 361 U.S. 147, 150 (1959).

[3] *Jennes v. Forbes*, 351 F. Supp. 88, 96 (D.R.I. 1972). In addition, advertisements expressing a racial preference appearing in a purely commercial context are not granted these same protections. *See U.S. v. Hunter*, 459 F.2d 205 (4th Cir. 1972) *cert. den.* 93 S.Ct. 235 (1972); *Holmgren v. Little Village Community Reporter*, 342 F. Supp. 512 (N.D. Ill. 1971).

In holding that commercial advertising in a business context can and must be regulated, this Court has stated that, while

> freedom of communicating information and disseminating opinion [enjoys the fullest protection of the First Amendment] the Constitution imposes no such restraint on government as respects purely commercial advertising.[4]

The type of business subject to regulation has been defined "roughly" to encompass "the production and exchange of goods and services for profit, as distinct from the production or exchange of ideas on political, religious, artistic and similar matters."[5]

Where a newspaper conducts activities of both an editorial and business nature, the Fourth Circuit Court of Appeals has stated that "a newspaper will not be insulated from the otherwise valid regulation of economic activity merely because it also engages in constitutionally protected dissemination of ideas."[6] In *Associated Press v. United States*, 326 U.S. 1, 65 S.Ct. 1416 (1945), this Court further stated:

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[4] *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942). *See Breard v. City of Alexandria*, 341 U.S. 622, 641-645 (1951); *New York State Broadcasters Ass'n. v. United States*, 414 F.2d 990, 998-999 (2nd Cir. 1969), *cert. denied*, 396 U.S. 1061 (1970); *Banzhaf v. FCC*, 132 U.S. App. D.C. 14, (1968), *cert. denied, sub nom. Tobacco Institute v. FCC*, 396 U.S. 842 (1969); *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1971), (three-judge court), *aff'd., sub nom. Capital Broadcasting Co. v. Kleindienst, Acting Attorney General*, 405 U.S. 1000 (1972).

[5] T. Emerson, *The System of Freedom of Expression* 414 (1970). *See also, Note, Freedom of Expression in a Commercial Context*, 78 Harv. L.Rev. 1191, 1192, 1194-5 (1965).

[6] *U.S. v. Hunter, supra*, note 2 at 212. *See Lorain Journal Co. v. United States*, 342 U.S. 143, 155-157 (1951).

> The fact that the publisher handles news while others handle food does not . . . afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate the laws regulating his business practices. 65 S.Ct. at 1418.

B. The Practice of the Press Meets the Commercial Activity Test.

The Pittsburgh Press (hereinafter sometimes referred to as the "Press") is a profit-making corporation engaged in publishing a newspaper. Among its pages is a classified advertising section which provides notifications of job opportunities. The format of the newspaper provides three separate column headings available for selection by the advertiser. These columns are labeled "Jobs–Male Interest", "Jobs–Female Interest" and "Jobs-Male-Female Interest". An employer designates a placement preference for his advertisement or chooses one at the suggestion of the newspaper.[7] Activities similar in nature characterize most newspapers today.

The Press claims that the City of Pittsburgh, through its Human Relations Ordinance No. 75, as amended by Ordinance No. 395, is attempting to effectuate social change at the expense of the freedom of the press. National policy, as defined by Congress, the President and federal and state agencies[8] today requires effec-

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[7] Testimony of Robert Seli, (A-172-173).

[8] Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e; Executive Order 11246 as amended by 11375 (1967); Revised Order No. 4 (1971); EEOC Guidelines on Discrimination Because of Sex, 29 CFR Chap. XIV, §1604 as amended; Iowa, Civil Rights Act, Iowa Code Ann. §601 (1973 Supp.); Minn., State Act Against Discrimination, Minn. Stat. §363 (1971); New Jersey, Law Against Discrimination, N.J. Stat. Ann.

tuation of whatever social change is necessary to eliminate all discrimination, including discrimination based upon sex. However, the City of Pittsburgh, while imposing an obligation upon every person to comply with its policy as defined in Ordinance No. 75[9] in no way prohibits a newspaper from expressing its editorial views or from disseminating news and ideas to the public. The prohibition of aiding, inciting or participating[10] in any discrimination through a newspaper's commercial activity in no way restricts a newspaper's editorial comment protected by the First Amendment.

The Press suggests that the judgment utilized in determining advertisement placement under its three column headings is an expression of editorial opinion rather than a function of ordinary business judgment. The Press admits that the three men who decide ad placement bear the titles of Editor, Business Manager and Classified Ad Manager. (A-170a). The fact that two of

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Tit. 10, Ch. 5 (1972 Supp.); Human Relations Ordinance of the City of Pittsburgh No. 75, as amended by Ordinance No. 395, July 1969.

[9]The policy of the Pittsburgh Ordinance No. 75, as amended by Ordinance 395, is as follows:

AN ORDINANCE–Prohibiting discrimination in employment, housing, public accommodations, and other areas of intergroup relations in the social, cultural, and economic life of the City of Pittsburgh; requiring fair employment practices, fair housing practices and fair public accommodations practices by prohibiting discrimination in employment, housing and public accommodations because of race, color, religion, ancestry, national origin or place of birth; or sex; establishing a Commission on Human Relations in the Office of the Mayor and prescribing the powers and duties thereof; providing penalties, and revising and consolidating the ordinances relating thereto.

[10]*See, infra* at note 19, §8(j).

these three positions relate solely to economic and commercial operations is proof sufficient of the commercial nature of ad placement.

The argument of the Pittsburgh Press that its column headings constitute a service designed to respond to customer preference[11] and thus editorial in nature is lacking both in legal and logical justification. In the course of managing a newspaper, an editor functions on many levels and in many different capacities. His primary purpose is that of presenting the editorial viewpoint of his newspaper. At other times, he may function as a general supervisor of his subordinates in matters of broad nature, including, on occasion, some of business judgment. It is illusory, however, to accord the status of editorial opinion to all decisions flowing from an editor. A judgment relating to classified advertising concerns only the economic running of a newspaper. Many decisions made by a newspaper's editorial staff, (i.e., what weight paper to use, keeping the price at 10¢ a day rather than raising it to 15¢ a day) are made in an attempt to comply with customer preference. However, this fact does not elevate such decisions to the level of being protected editorial judgments. They are merely decisions made by an editor and his staff relating to business aspects of a newspaper.

The Press is in business to make a profit and the layout of the classified ad section of the newspaper is directly related to the amount of profit which the newspaper enjoys. By devising a scheme whereby advertisements for job opportunities are placed in separate columns depending upon whether the jobs are deemed to be

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[11] *See infra* for a discussion of the Press' response to customer preference.

generally of male or female interest, the Press is attempting firmly to secure the economic stability of its business. An employer wishing to bring an ad to the attention of all readers seeking employment[12] now must insert two if not three ads in the paper, thus causing the Press to enjoy an even greater profit. This is substantiated by the testimony of Mr. Leland P. Deck, a specialist in Personnel Management at the University of Pittsburgh, given at the January 15, 1970 hearing. (A-56a).

Q. Has [the University of Pittsburgh] ever had a complaint lodged against it by the Pittsburgh or Pennsylvania Human Relations Commission?

A. I have had a complaint filed against me with the Mayor's Committee on Human Relations.

* * * * *

Q. What was the nature of the inquiry of the complaint?

A. Well, as I understand, the complaint was that I was violating the Civil Rights Act by advertising in columns with a heading "Jobs for Men" or "Jobs for Women". And the settlement was that since it was necessary to get the kind of applicants we wanted to fill the vacancies which we have, it would be necessary to advertise where we would get the proper results . . . Sometimes we would put "Male" or "Female" itself if we were advertising in the "Male" Section or "Female" Section. That . . . increased my cost by about 10%.

[12] In addition, an employer may be forced to insert more than one ad in the paper in order to comply with Title VII of the Civil Rights Act of 1964, the EEOC Guidelines and the state and local fair employment ordinances.

Q. Is there a way of alleviating the expense factor of the University and to comply with the nature of the conciliation?

A. Well, the newspapers could change its classification system and perhaps the new system would be without critics.

Q. When the present system is constituted, you have no option or alternatives?

A. I have no practical options or alternatives. It costs about $11.00 in advertising to get one new qualified employee on the job, if we advertise in the Pittsburgh Press.

* * * * *

Q. Prior to the filing of the complaint, how did you list your want ads?

A. We would advertise for some jobs in the help wanted "male" sections. For some jobs we would advertise in both sections. For some jobs we advertised in the "female" section, and for some jobs we advertised in that neuter section, "male-female".

Q. Did you find this satisfactory?

A. We got the results for the cost of $11 per candidate. There were many cases where we had to advertise in two sections to get the results we wanted.

Q. Can you give us an explanation for that?

A. Well, if one is recruiting for a secretary and ninety-nine and nine-tenths percent of all secretaries in the community are female, we find we solve our problem by advertising in the section for females. If we are advertising for a engineer–we haven't even tried advertising in the female section on the presumption we would be

wasting our money. If we are advertising for a laboratory assistant, we may very well advertise one day in the male section, another day in the female section, and another day in the male-female section.

Q. May I ask, in that particular case, why you don't advertise in the "male-female" section?

A. Because that section, we believe, is looked at by job seekers for very limited number of categories of jobs and we do not want, as a public institution, we really don't want any job seeker who is qualified to miss an opportunity for a job as a laboratory technician because he or she failed to read seven pages of ads. We want to maximize our opportunities to select the best qualified candidate from a number of candidates.

* * * * *

Q. If what we are seeking to accomplish is to get the maximum return on job applicants, would the same result be accomplished easier if the job classifications were placed in some order, alphabetical order?

A. I am not sure, but I do think if it were done that way, some of my clientele would be a little happier with me and could turn their harassment over to some other issue other than advertisement. I think it would be preferable for the society in which we live today to eliminate the classification system, which is really anachronistic, I think its [sic] offensive to a male nurse to have to look in the female section to have to find his next job.

om Mr. Deck's testimony, it appears that what the ess is concerned about is not the freedom of the press

or due process. Its major concern appears to be the possible loss of revenue which would result should the newspaper be forced to abolish its present column headings. The classified layout system devised by the newspaper is obviously and intentionally a commercial aspect of the paper's function, not within the umbrella of protection afforded by the First Amendment.

C. Case Law Supports the View that Freedom of the Press Is Not Injured by Regulation of Classified Advertising To Prevent Prohibited Discrimination.

While few court challenges to regulation of classified advertising to prevent discrimination have reached appellate level, in at least one case a Court of Appeals has gone far beyond the relief requested in the present case. In *United States v. Hunter*, 459 F.2d 205 (4th Cir.), *cert. den.* ___ U.S. ___, 93 S.Ct. 235 (1972), the Fourth Circuit Court of Appeals held that Section 3604(c) of Title VIII (Fair Housing) of the Civil Rights Act of 1968, making it unlawful to print any advertisement that indicates a preference based on race, neither infringed upon a newspaper's First Amendment freedom nor adversely affected the valid dissemination of opinion or information.[13] As the Court there stated:

> Contrary to the contentions in Hunter's brief, nothing in the statute or the relief requested by the Attorney General prohibits a newspaper from publishing news accounts concerning racial discrimination in housing, or criticizing the Government's enforcement of the Fair Housing Title, or editorially

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[13] One of the advertisements involved in *Hunter* read:

FOR RENT – Furnished basement apartment. In private white home. Call JO 3-5493.

> advocating repeal of the Act. [Citations omitted] Only publication of advertisements which indicate a discriminatory preference for certain customers in seeking a buyer or a renter of a dwelling—a commercial transaction—is proscribed. 459 F.2d at note 9.

In finding a duty on the part of the newspapers to screen ads before publishing them, the court stated that:

> a newspaper publisher can easily distinguish between permissible and impermissible advertisements in discharging his duty to reject those that violate [the law] . . . . [A] publisher can readily determine from the face of an advertisement whether it is intended to express a discriminatory preference. 459 F.2d at 212, note 9.

While the Court in *Hunter* found no violation of First Amendment freedoms in requiring newspapers to screen advertisements prior to printing, the issue in the present case is only whether a newspaper's First Amendment freedom is infringed by requiring it to abolish sex-segregated column headings. A federal District Court addressed this question directly last year: In *Greenfield v. Field Enterprises,* ___ F. Supp. ___, 4 FEP Cases 548 (N.D. Ill. 1972), an action brought under Title VII of the Civil Rights Act of 1964,[14] the court addressed itself to the defendant's argument that governmental regulation of newspaper employment advertisements constitutes a prior restraint on the press:

> The defendant sees the relief sought in this case . . . as a most invidious encroachment upon cherished American rights. This alarm is without

[14] In *Greenfield,* the Court, finding that a newspaper was not an employment agency under Title VII, granted the defendant newspaper's motion to dismiss.

basis. In addition to being the conduits for the American public, newspapers are businesses. In their commercial aspect, they enjoy no special first amendment privileges. If their practices in the commercial business of publishing classified advertisements for compensation violate the Civil Rights Act of 1964 . . . the first amendment does not shield them from the consequences of this activity. 4 FEP Cases at 550.

Even if commercial job advertisements as found in the Press' classified section, are deemed entitled to constitutional protection, such right to protection is not absolute. In *Branzburg v. Hayes*, ___ U.S. ___, 92 S.Ct. 2646 (1972), in determining the permissible regulation of the press, this Court used as its criteria a balancing of equities: the individual and social interest in freedom of expression was weighed against the social interest to be furthered by regulation. In the case now before the Court, the equities to be balanced are a possible indirect burden on a newspaper's First Amendment rights compared to an adverse impact on an individual's fundamental right to work.[15]

Sex-segregated employment advertisements inherently discriminate against all women striving to acquire jobs or to upgrade their employment status. The discriminatory effects of sexually separated help-wanted classifieds are no longer in the realm of speculative harm.[16] It is,

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[15] *Truax v. Raich*, 239 U.S. 33, 41 (1915).

[16] The President's Task Force on Women's Rights and Responsibilities confirms the fact that "sex bias takes a greater economic toll than racial bias." The median earnings of white men is $7,396; of Negro men, $4,777; of white women, $4,279; of Negro women, $3,194. Thus, sex-based discrimination, a difference in treatment without a rational basis, means dollars denied to women workers who have been deterred or barred from male job opportunities,

therefore, not an abridgement of freedom of the press to require the Pittsburgh Press to eliminate its discriminatory headings. The Press will be able to continue to exercise its editorial powers of comment and dissemination of ideas. No newspaper contends that freedom of the press would be eroded or abridged by prohibiting the

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dollars saved by employers who can hire women for the lower-paying jobs. Almost 30% of all year-round, full-time women workers earn less than $3,000 per year. (A-98). The upper limits of opportunity and mobility for working women are so structured that less than 7% of the women in this country earn salaries of $10,000 per year or more. Women are not only denied equal access to jobs, but under the policies established by the Press, they are discouraged from applying for certain work. The Press' add placement practice tends to prevent women even from being sufficiently notified of job opportunities.

The economic plight of the American working woman has been well documented and its severity has been established with certainty. For a majority of women in the 1970's, the need to work is not a simple decision of the idle and bored, but a choice fostered by compelling economic necessity. A majority of these women do not have the option of working solely for personal pleasure. Nearly two-thirds of all adults living in poverty are women. More than 31.5 million women are working today; by 1980 this figure is expected to reach 37 million and the proportion of women to the total work force ranges from a low of 34% in Pittsburgh to a high of 42% in Washington, D.C.

Thousands upon thousands of American family units are no longer headed by the traditional male wage earner. For these working women—mothers, widows, divorcees, the aged, disadvantaged young—employment and the wages they earn are of imperative concern to them and their dependents. These women workers, regardless of their ability, training or aspirations, are being forced into a lower economic level of very limited circumfrence. The lowest level is poverty, and the reliance on the welfare system. A very high percentage of women who are employed full-time exist at this level.

See Report of the President's Task Force on Women's Rights and Responsibilities, A Matter of Simple Justice, April, 1970, at 18

use of captions such as "Jobs–Black Interest," "Jobs–Jewish Interest," or "Jobs–Irish Interest." (A-391a). Equality of the sexes before the law is also an "idea whose time has come."[17]

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and at 54, n. 52; Richard D. Lyons, "Pay Gap Widens Between the Sexes," New York Times December 28, 1972 at 34, col. 1; Women's Bureau, Wage and Labor Standards Administration, U.S. Department of Labor, "Why Women Work" (rev. ed. 1971) (WB-3092); "Women's Labor Ranks Grow, But Salary Gap with Men Widens." *Fair Employment Report*, March 30, 1970 at 41; Women's Bureau, Workplace Standards, U.S. Department of Labor, "Who are the Working Mothers?" (1970) (Leaflet 37); Women's Bureau, Wage and Labor Standards Administration, U.S. Department of Labor, "Women Workers in Regional Areas and In Large States and Metropolitan Areas," (1971); Women's Bureau, Wage and Labor Standards Administration, U.S. Department of Labor, "Fact Sheet on the American Family in Poverty," (rev. ed. 1971).

[17] *In Morrow v. Mississippi Publishers*, 5 FEP Cases 287 (S.D. Miss. 1972), another court was faced with the issue of whether or not it was legally permissible for a newspaper to publish sex-segregated employment advertisements under Title VII of the Civil Rights Act of 1964. In denying the defendant's motion for summary judgment, the court stated:

> Pending trial on the merits, this Court adopts the concluding language of the court in the *Greenfield* case, *supra*: "It seems appropriate to suggest, however, to the defendant, however gratuitously, that the position of the plaintiffs is an idea whose time has come and that serious consideration be given to revision of the classification practices in employment advertising without reference to and free from the compulsion of the jurisdiction of the Court." 5 FEP Cases at 289.

II.

THE PITTSBURGH PRESS AIDS AND PARTICIPATES IN DISCRIMINATION AGAINST WOMEN IN VIOLATION OF ORDINANCE NO. 75.

An examination of the text of Pittsburgh's Ordinance and of the testimony before the Human Relations Commission establish that the newspaper's selection of column headings must comply with the ordinance and that no issue of due process is here involved.

A. Due Process Is Not at Issue in This Case.

The Pittsburgh Press has nowhere specifically stated the constitutional basis of its due process argument. For purposes of further discussion *Amicus* assumes, as apparently did the Courts of Pennsylvania, that the Press is alleging a violation of the Fourteenth Amendment to the United States Constitution. The due process argument presented by the Press is based apparently on the claim that before a newspaper can be found to be in violation of the ordinance, proof is required that an advertiser in fact refused to employ a female job applicant under discriminatory circumstances. The American Newspaper Publishers' Association claims further that the failure to allege and prove the occurrence of a specific act of discrimination on the part of one of the employers who advertised in the Press was fatal to the sufficiency of the complaint and, therefore, constituted a denial of due process.

Although the Pittsburgh Press alleges a question of due process is in issue, the newspaper appears instead to be attacking the correctness of the Commission's judgment. Review of such a challenge must turn on a weighing of the evidence. The Commission, having heard all witnesses'

testimony, was in the best position to determine the evidence. Absent a showing of abuse of discretion on the part of the Commission, its decision should not be reversed.

In a state railway commission decision, a due process issue was raised in a similar manner. In *Railroad Commission v. Pacific Gas and Electric Company*, 302 U.S. 388 (1938), this Court found no violation of due process, stating:

> . . . There must be due notice and an opportunity to be heard, the procedure must be consistent with the essentials of a fair trial, and the Commission must act upon evidence and not arbitrarily.
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> * * * * *
>
> . . . When the rate-making agency of the state gives a fair hearing, receives and considers the competent evidence that is offered, affords opportunity through evidence and argument to challenge the result, and makes its determination upon evidence and not arbitrarily, the requirements of procedural due process are met. 302 U.S. at 393-394.

The Pittsburgh Press does not deny the right of a municipality to enact appropriate legislation for the regulation of discriminatory practices, nor does the Press now claim that it was denied a full and fair hearing with respect to whether any of its actions violated provisions of the Pittsburgh Ordinance. (A-385a, 386a). Indeed, the Press does not claim that any specific aspect of due process was denied it nor did the Commonwealth Court of Pennsylvania find any abuse of discretion on the part of the Pittsburgh Human Relations Commission:

> In its "Decision and Order" the Commission made ten findings of fact which, upon our review of the

record are supported by substantial evidence . . . (A-382a).

B. Principles of Criminal Law Are Not Applicable to the Present Case.

The Pittsburgh Press argues that those principles relating to criminal conspiracy proceedings requiring an act by a principal before an "aider and abettor" can be charged, should apply to this case. There is no evidence of intent on the part of the Pittsburgh City Council to apply such a definition to the terms "aid, incite, compel, coerce or participate".[18] In fact, the term "abettor" is not found anywhere in the language of the Ordinance; actions brought under this ordinance are civil in nature, and the remedies available are civil in concept.

The Pittsburgh Ordinance does not grant the Commission any powers of a criminal nature. The Commission

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[18] Section 296(6) of the New York Human Rights Law states:

> It shall be an unlawful discriminatory practice for any person to aid, *abet*, incite, compel or coerce the doing of any acts forbidden under this article or attempt to do so. (Emphasis added.)

This statute has been interpreted by the Supreme Court, Erie County, to permit application of judicial principles of criminal liability, *NOW v. Buffalo Courier-Express*, 5 FEP Cases 95 (N.Y. S.Ct., Erie County 1972); however, the Appellate Division of the New York Supreme Court has also interpreted this same section pointing to a distinction between the New York statutory scheme and the Pittsburgh Ordinance. *NOW v. State Division of Human Rights*, 5 FEP Cases 323 (N.Y.S.Ct. Appellate Division, 1972). The New York Appellate Division strongly suggested that had the New York statute been identical in all respects to Pittsburgh's ordinance, the New York Court would have found a newspaper publishing sex-segregated help wanted advertisements to be in violation of the statute.

has authority to find that an individual in fact committed an unlawful employment practice in violation of the ordinance. It can also grant certain orders including cease and desist orders, reinstatement, and back pay. (A-430a). The Commission itself has no authority to secure enforcement. Only in the event that an individual commits a further act, the actual violation of an order of the Commission, may the Commission certify the case to the City Solicitor for further proceedings. (A-431a). The Commonwealth Court stated:

> This is not a matter of whether the Pittsburgh Press *intentionally conspired* with some employer or employers to discriminate against women. What is of importance is that through the use of its arbitrarily selected column headings the Pittsburgh Press "aids" such employers to discriminate. When the Pittsburgh Press arbitrarily arranges and publishes such column headings it is aiding in sex discrimination. (Emphasis added) (A-392a).

C. Maintaining Separate Sex-Segregated Help-Wanted Columns Constitutes an Unfair Employment Practice Within the Meaning of the Pittsburgh Ordinance.

The Press claims that a newspaper cannot be found to be in violation of the Human Relations Ordinance unless an employer who advertised in the Press is first found to have actually discriminated against a female. An analysis of Pittsburgh City Ordinance No. 75 indicates that newspaper publishers are covered by its provisions separate and apart from any showing of a discriminatory act on the part of another.

The classified advertising procedures of the Press are established by the newspaper rather than by its advertisers or its public. The Press by maintaining separate column headings and actively participating in the advertiser's "proper" choice of columns is acting unlawfully and in violation of Human Relations Ordinance No. 75, as amended by Ordinance No. 395. The Ordinance, one of broad purposes, is described as being:

> AN ORDINANCE–prohibiting discrimination in employment . . . in the social, cultural and economic life of the City of Pittsburgh; requiring fair employment practices . . . by prohibiting discrimination in employment . . . because of . . . sex.

The scope of the Ordinance is set forth in Section 3:

> This Ordinance applies to discriminatory practices, including but not limited to discrimination in employment, housing and public accommodations, which occur within the territorial limits of the City of Pittsburgh and to employment, contracted for, performed or to be performed within these limits, and to housing accommodations and places of

public accommodation, resort, recreation and amusement located within the territorial limits of the City.

Section 8 of the Ordinance enumerates various employment practices deemed to be unlawful,[19] while

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[19] Section 8 of the Pittsburgh Human Rights Ordinance reads as follows:

SECTION 8. UNLAWFUL EMPLOYMENT PRACTICES

It shall be an unlawful employment practice, except where based upon applicable national security regulations established by the United States, by the Commonwealth of Pennsylvania, or by any political subdivision of the Commonwealth having jurisdiction in the City of Pittsburgh, or except where based upon a bona fide occupational exemption certified by the Commission in accordance with Section 7, subsection (d) of this ordinance:

(a) For any employer to refuse to hire any person or otherwise to discriminate against any person with respect to hiring, tenure, compensation, promotion, discharge or any other terms, conditions or privileges directly or indirectly related to employment because of race, color, religion, ancestry, national origin or place of birth.

(b) For any employer, employment agency or labor organization to establish, announce or follow a policy of denying or limiting, through a quota system or otherwise, the employment or membership opportunities of any person or group of persons because of race, color, religion, ancestry, national origin or place of birth.

(c) For any employer, labor organization, employment agency or any joint labor-management committee controlling apprentice training programs to deny to or withhold from any person the right to be admitted to or participate in a guidance program, an apprenticeship training program, an on-the-job training program or any other occupational training program because of race, color, religion, ancestry, national origin or place of birth.

(d) For any employer, employment agency or labor organization to require of any applicant for employment or membership any information concerning race, color, religion, ancestry, national origin or place of birth.

subsection (e) of that section makes it an unlawful employment practice for:

(e) For any employer, employment agency or labor organization to publish or circulate, or to cause to be published or circulated, any notice or advertisement relating to employment or membership which indicates any discrimination because of race, color, religion, ancestry, national origin or place of birth.

(f) For any employment agency to fail or refuse to classify properly or refer to employment or otherwise to discriminate against any person because of race, color, religion, ancestry, national origin or place of birth.

(g) For any employer substantially to confine or limit recruitment or hiring of employees, with intent to circumvent the spirit and purpose of this ordinance, to any employment agency, employment service, labor organization, training school, training center or any other employee-referring source which serves persons who are predominantly of the same race, color, religion, ancestry, national origin or place of birth.

(h) For any labor organization to discriminate against any person in any way which would deprive or limit his employment opportunities or otherwise adversely affect his status as an applicant for employment or as an employee with regard to tenure, compensation, promotion, discharge or any other terms, conditions or privileges directly or indirectly related to employment because of race, color, religion, ancestry, national origin or place of birth.

(i) For any employer, employment agency or labor organization to discriminate against any person because he has opposed any practice forbidden by his ordinance or because he has made a complaint or testified or assisted in any manner in any investigation or proceeding under his ordinance.

(j) For any person, whether or not an employer, employment agency or labor organization, to aid, incite, compel, coerce or participate in the doing of any act declared to be an unlawful employment practice by this ordinance, or to obstruct or prevent any person from enforcing or complying with the provisions of this ordinance or any rule, regulation or order of the Commission, or to attempt directly or indirectly to commit any act declared by this ordinance to be an unlawful employment practice.

> any employer . . . to publish or cause to be published or circulated any notice or advertisement relating to employment . . . which indicates any discrimination [because of sex].

Subsection (j) of Section 8 in turn makes it a violation for "any person to aid, incite, compel, coerce or participate" in the doing of *any* of the acts enumerated in Section 8, Subsections (a) through (i).

Amicus contends it is sufficient to establish that a newspaper itself committed an unfair employment practice in order to bring it within the confines of the ordinance. The Press, by making sex-segregated help-wanted columns available to employers and publishing job advertisements in those columns is committing an unfair employment practice within the meaning and intent of the ordinance. The very most that can be required of a complaint under Section 8(j) of the Pittsburgh Ordinance is to show generally that the actions of employers placing job opportunity advertisements in the Press were discriminatory under Section 8(a) through (i) of the ordinance.

Nowhere in the ordinance do the sections relevant to aiding and participating indicate that the only unlawful practices are those in aid of an employer, a labor organization or employment agency. The absence of such a relationship is noteworthy. The ordinance states numerous times that it shall be unlawful for any person to aid or participate in the *doing* of an unlawful practice. Section 8(j) does not make an otherwise unfair employment practice unlawful only if assisting someone else in the doing of an unfair labor practice.

This interpretive view is substantiated by Section 11 of the ordinance, which provides that:

It shall be unlawful for any person, *whether or not* within the named classifications set forth in the ordinance, to aid, incite, compel, coerce or participate in the doing of any act declared to be an unlawful practice under this ordinance, or to obstruct or prevent enforcement or compliance with the provisions of this ordinance or any rule, regulation or order of the Commission or to attempt directly or indirectly to commit any act declared by this ordinance to be an unlawful practice. (Emphasis added)

The Press aided in the discriminatory practices of employers by encouraging advertisers to select a column preference and even in some instances by making the discriminatory choice itself, in a situation where, admittedly, no advertisers had ever been granted a bona fide occupational exemption by the City of Pittsburgh pursuant to Section 7(d) of the ordinance.[20] The procedure of the Press actually appears to have been designed to encourage advertisers to select either the "male interest" or "female interest" column rather than in the "neuter" male-female column.

The following excerpts of the testimony of Robert Seli, Classified Advertising Manager of the Pittsburgh Press, before the Commission describe the ad placement procedures of the Pittsburgh Press (A-126).

A. . . . Most of the people who call in have a preference. . . . They know where they want the ad to run . . . male or female interest. They express this interest where they would like to have this ad placed. In what category. At times,

[20] Decision and order of the Pittsburgh Commission on Human Relations, July 23, 1970 set out in Appendix to Petition for a Writ of Certiorari at 1a, 13a.

when they do not express a preference, we ask them where they would prefer to have it placed.

Q. When no preference is expressed by advertisers, you then solicit from the advertiser a response to whether he has a preference?

A. Yes, where they would prefer to have it placed.

(A-172a, 173a).

Q. . . . Supposing [customer] says, I leave it up to you.

A. . . . We explain to him where most of these jobs run—where the interest runs. This is where the male interest runs; this is where the female interest runs. These are the number of jobs in here. And they know the advertisers know, where they get the best results. I think Mr. Deck in his testimony before stated this. That they get better results when they run it in the separate classification. It's of more interest to the man or it's of more interest to the women.

Q. . . . Do you then proceed to tell them of the several categories that should go under this or that, take your choice?

A. We tell them where the majority is—or we try to find out what type of person they are looking for. *Are they looking for a man, or are they looking for a woman? They know this. And they are interested or more interested in a man or interested in a woman. They know this, and they state this.* This is where they want it. (Emphasis added)

There is no doubt that the actions of the Pittsburgh Press as testified to before the Commission are discriminatory toward women. The Common Pleas Court of Pennsylvania stated:

> The evidence establishes that the Press requests that its advertisers indicate a preference as to where any employment ad is placed. There was no evidence offered to show that the preference of the advertisers is based in any way upon any specific bona fide occupational qualifications as certified by the Commission or based upon any exemption or exception to the operation of the terms of the Ordinance. Nor is there evidence that the Press questions its advertisers about any exceptions when it requires that a preference be designated. (Appendix to Petitioner's Brief at 32a).

The Court then found:

> There is evidence that the classification system used by the Press discourages women from application for jobs classified for male interest. (A-33a).

The Commonwealth Court found substantial evidence to support the conclusion that:

> . . . in its employment advertising the Pittsburgh Press was aiding employers in discriminating against women through the use of the above-noted column headings and therefore was engaged in an unlawful employment practice violative of Section 8(j) of the Ordinance. (A-382a).

The basis for the help-wanted classified advertising procedures of the Press as expressed in Petitioner's Brief is that:

> . . . the Press believes that the employment patterns in this country generally reflect job interest and qualification along sex lines. . . .
>
> . . . Most secretaries and nurses are women and most laborers and managers are men, and, therefore it is not unreasonable to believe that most qualified applicants for a job advertisement will be attracted

from the men or women presently filling such positions. (Petitioner's Brief at 26).

In direct opposition to the Press' view of job-related interests is a statement of the U.S. Department of Labor:

> Jobs, with extremely rare exceptions, are sexless. Women are found in all of the 479 occupations listed in the 1960 decennial census. Tradition rather than job content has led to labeling certain jobs as women's and others as men's. For example, although few women work as engineers, studies show that two-thirds as many girls as boys have an aptitude for this kind of work. U.S. Dept. of Labor, Employment Administration, Women's Bureau, April, 1971, *The Myth and the Reality*, 2.

Even if the Court were to find that Section 8(j) required proof that an employer engaged in a discriminatory practice before Section 8(i) or Section 11 became operative as a viable restriction on discriminatory practices, the activities of the Press are within the jurisdiction of the Commission. The fact that employers listed job opportunities under sex-segregated columns in the Press without a bona fide occupational exemption certificate (*see supra*, n. 20, p. 24) establishes a *prima facie* violation of the Ordinance (*see* Section 8(e)) and the maintenance by the Pittsburgh Press of separate male and female columns rather than a separate column clearly designated for advertisers holding bona fide occupational exemption certificates is proof of the newspaper's participation and help in this practice. No further showing of a violation should be required.

The Pennsylvania Commonwealth Court of Appeals in this case stated:

> It is no longer possible to state that all women desire or have a "interest" in, any one type of classifica-

tion of work. Some women have the desire, ability and stamina to do any work than [sic] men can do. Once we accept such a premise it then becomes logically impossible to permit continued segregation of employment want-ads by column headings for any job coming within the purview of the ordinance. (A-390-391a).

Continuing, the Court said:

The right to work and its concomitant opportunity to achieve economic security and stability are essential to the pursuit of life, liberty and happiness. As early as 1915, the United States Supreme Court declared that:

"... The right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment [Fourteenth] to secure. *Truax v. Raich*, 239 U.S. 33, 41, 60 L.Ed. 131, 135 (1915)." (A-59a).

The Pittsburgh Press in its brief (Petitioner's Brief p. 25) attempts to justify its discriminatory practices in two ways. Each is equally lacking in logic and support. The Press alleges that it has a special right to do what others under the law cannot, merely because it is a newspaper and because it *believes* that certain types of jobs are "typically" those in which male workers have an interest while other types of jobs are "women's work." The Press also justifies its position by stating that readers prefer the help wanted columns to be segregated and that such a practice assures maximum reader exposure and response to employment advertisements. This statement is a contradiction in terms since almost half of the available work force is not invited to read either of the sex segregated columns and any ad therefore may not be

read by many seeking jobs. Testimony established that a female would usually be discouraged from applying for a job under a "male interest" column. (A-80a). The newspaper's desire for maximum exposure and responses to ads could best be obtained with a single help-wanted column available to all, regardless of a presumed and unproven sex-based interest in employment. In addition, testimony established only that advertisers and newspapers prefer segregated columns, not that newspaper readers do. (A-172a, 173a). Assuming *arguendo* that such preferences do exist, no automatic assumption of legality would necessarily follow. In *Diaz v. Pan American Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971) the Court, speaking to the principle of customer preference in a sex discrimination case arising under Title VII of the Civil Rights Act, stated:

> While we recognize that the public's expectation of finding one sex in a particular role may cause some initial difficulty, it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome. Thus we feel that customer preference may be taken into account only when it is based on the company's inability to perform the primary function or service it offers. 442 F.2d at 389.

A comparison of the evidence reveals that the jobs offered under "male-interest", and "female-interest" headings are disparate in terms of the calibre of jobs and the salaries offered for seemingly comparable areas of work. Documentation of this discovery shows that low status and low paying jobs are predominantly under the "female-interest" captions; that the high-status and high-

pay jobs appear under the "male-interest" headings.[21] (A-343-353a, 355a).

Testimony of Ruth Anderson, one of the witnesses before the Commission, reveals that she responded to a "male only" dishwasher ad and was immediately refused the position because of her sex. (A-262-265a). The Commonwealth Court of Pennsylvania took note of this testimony in its opinion:

> In view of the fact that the discriminatory practice came about as a result of an ad placed by the employer and was published in a arbitrary segregated "male" column, we hold that there was substantial evidence placed in the record to support the charge made by N.O.W. (Opinion, A-389a).

The policy of the Press apparently is based on a stereotypical view of times long past. The newspaper completely ignores the intent of the Pittsburgh Human Relations Ordinance, as well as state and federal law, against discrimination on account of sex. The Press appears to be making an argument on behalf of the *status quo* and the backseat position of women in today's job market. *Amicus* believes that the Pennsylvania Commonwealth Court has succinctly and correctly summarized the proper conclusion to this case in its statement that:

> We agree with counsel for the Pittsburgh Press when he states, "The purpose of the statute was to prohibit practices which denied job opportunities to

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[21] Exhibit No. 1 at page 327a of the Appendix shows that the average salary for job opportunities listed under the "male interest" column in the January 4, 1970, classified ad section of the Pittsburgh Press was $16,000.00; whereas, the average salary for positions listed under the "female interest" column was $8,500.00 and the average salary for jobs under the "male-female" help wanted column was $12,000.00.

individuals because of sex." The Pittsburgh Press cannot frustrate that purpose by a declaration that column headings are arranged for a reader's convenience and that any recourse to be had by women lies against those employers who do in fact discriminate. (A-59).

Both the Pittsburgh Press and its *Amicus*, ANPA, claim that unless this case is reversed, newspapers will be required to

> . . . screen advertising at their peril and in that screening process to make instantaneous judgments on the discriminatory impact of thousands of employment ads daily, the ordinance as interpreted places an unconstitutional burden on the Press. (*Amicus* Brief, p. 19).

Ordinance No. 75 provides a clear, simple procedure for certifying bona fide occupational exemptions. (A-Opinion, 380a). Indeed, no onerous burden is placed on the newspaper. The Pittsburgh Press, in compliance with federal policies apparently already screens its ads for racial content (A-162a). Under the Pittsburgh Ordinance, the newspaper now need only go the last half-mile toward equality by providing a column heading for positions for which bona fide occupational exemption certificates have been obtained and a single column for all other help-wanted advertisers.

CONCLUSION

For the reasons stated above, the decision of the Supreme Court of Pennsylvania should be affirmed.

Respectfully submitted,

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